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Brittany Xavier and Thrifts and Threads, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRITTANY XAVIER, an individual;
and THRIFTS AND THREADS, INC.,
a California Corporation,

Plaintiffs,

vs.

UNDEFINED, INC., a Delaware
Corporation; and DOES 1-10, inclusive,

Defendants.

Case No. 3:23-cv-1483

COMPLAINT

1. COPYRIGHT INFRINGEMENT (17 U.S.C. § 501(a));
2. VIOLATION OF THE CALIFORNIA STATUTORY RIGHT OF PUBLICITY (CAL. CIV. CODE § 3344);
3. VIOLATION OF THE CALIFORNIA COMMON LAW RIGHT OF PUBLICITY;
4. FALSE ENDORSEMENT AND UNFAIR COMPETITION UNDER THE LANHAM ACT (15 U.S.C. § 1125(a))
5. UNFAIR COMPETITION (CAL. BUS. & PROF. CODE § 17200)
6. FALSE ADVERTISING (CAL. BUS. & PROF. CODE § 17500)

DEMAND FOR JURY TRIAL

1 Plaintiffs Brittany Xavier (“Ms. Xavier”) and Thrifts and Threads, Inc.
 2 (“Thrifts and Threads”) (collectively, “Plaintiffs”) allege as follows:

3 **INTRODUCTION**

4 1. Plaintiffs bring this action for injunctive relief and damages because
 5 Defendants have infringed Thrifts and Threads’ copyright rights, violated Ms.
 6 Xavier’s statutory and common law right of publicity, and engaged in false
 7 advertising and unfair competition, by using Thrifts and Threads’ copyrighted
 8 photograph and Ms. Xavier’s image, likeness, and persona – ***without Plaintiffs’***
 9 ***consent*** – to promote Defendants’ company and products.

10 2. Ms. Xavier is a globally recognized fashion influencer, content creator,
 11 and successful entrepreneur.

12 3. Ms. Xavier started her style blog in December 2013 and shares content
 13 regularly via her YouTube channel and social media sites such as Instagram and
 14 TikTok, where she has millions of followers.

15 4. Ms. Xavier has been featured in *Vogue*, *Elle*, *Glamour*, *InStyle*, and
 16 countless other fashion magazines and blogs and is highly sought after for her style
 17 acumen and advice.

18 5. In addition, given her celebrity and influence, Ms. Xavier is highly
 19 sought after by companies hoping to secure her endorsement of their products, and
 20 those companies are willing pay significant sums to engage Ms. Xavier to help
 21 promote their brands. Even a single social media post by Ms. Xavier can garner
 22 fees of tens of thousands of dollars, and her longer-term endorsement arrangements
 23 command fees in the hundreds of thousands of dollars.

24 6. Ms. Xavier has selectively endorsed, and continues to selectively
 25 endorse, various products and services.

26 7. Ms. Xavier’s name, image, likeness, and persona have come to be
 27 associated in the minds of the consuming public with products and services that Ms.
 28 Xavier endorses.

1 8. Ms. Xavier maintains strict control over the manner in which her
2 name, image, likeness, and persona are used.

3 9. Ms. Xavier exercises careful consideration in selecting and approving
4 products and services that she will permit to license or use her name, image,
5 likeness, or persona. She restricts such use to products and services for which she
6 is fairly compensated.

7 10. Hoping to benefit from Ms. Xavier's celebrity and influence,
8 Defendant Undefined, Inc. ("Undefined") has used a derivative image of Thrifts
9 and Threads' copyrighted photograph, and Ms. Xavier's image, likeness, and
10 persona, without Plaintiffs' consent, to promote Undefined, and specifically to
11 promote Undefined's R&R Sun Serum (the "Infringing Products") directly via its
12 website and social media, as well as through third party sites and in stores.

13 11. Undefined's unauthorized use of Thrifts and Threads' photograph and
14 Ms. Xavier's image, likeness, and persona to promote Undefined and its products
15 are blatant and willful violations of Thrifts and Threads' copyright rights and Ms.
16 Xavier's statutory and common law rights of publicity, unfair competition, and
17 false advertising. By this action, Plaintiffs seek preliminary and permanent
18 injunctive relief, an award of compensatory and treble damages, the disgorgement
19 of Undefined's ill-gotten profits, and an award of punitive damages to deter
20 Undefined from future violations of Ms. Xavier's personal and intellectual property
21 rights.

22 **JURISDICTION AND VENUE**

23 12. The Court has original jurisdiction pursuant to 28 U.S.C. §§ 1331,
24 1338. This is a civil action arising under federal law, the Copyright Act of 1976 as
25 amended (codified at 17 U.S.C. § 101, et seq.) and the Lanham Act of 1946 as
26 amended (codified at 15 U.S.C. § 1051, et seq.). The pendent state law claims are
27 so related to the federal claims that they form part of the same case or controversy
28 under Article III of the United States Constitution. The court therefore has

1 supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367(a).

2 13. This Court has personal jurisdiction over Defendants because they
3 regularly transact, do, and solicit business in this judicial district, including by
4 offering to sell, or causing to be offered for sale, and/or selling products using
5 Thrifts and Threads' photograph and Ms. Xavier's image, likeness, and/or persona
6 in a manner that infringes Thrifts and Threads' copyright rights and violates Ms.
7 Xavier's statutory and common law rights of publicity, including in California and
8 in this judicial district. Defendants also have committed tortious acts within
9 California, including this judicial district, causing injury to Plaintiffs as alleged
10 further herein. Plaintiffs are informed and believes, and based thereon allege, that
11 Defendants derive substantial revenue from interstate commerce.

12 14. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)
13 and (c) because Defendants reside in this judicial district for venue purposes under
14 28 U.S.C. § 1391(c)(2); a substantial part of the events or omissions giving rise to
15 Plaintiffs' claims occurred in this district; a substantial part of property that is the
16 subject of the action is situated in this district; and Undefined is subject to the
17 Court's personal jurisdiction with respect to this action.

18 **PARTIES**

19 15. Plaintiff Brittany Xavier is, and at all relevant times herein has been,
20 an individual and resident and domiciliary of Los Angeles, California.

21 16. Plaintiff Thrifts and Threads is, and at all relevant times herein has
22 been, a California corporation with its principal place of business in Pasadena,
23 California.

24 17. Plaintiffs are informed and believe, and based thereon allege, that
25 Defendant Undefined, Inc., is, and at all relevant times herein has been, a Delaware
26 corporation with its principal place of business in San Francisco, California.

27 18. Plaintiffs are informed and believe, and based thereon allege, that the
28 fictitiously named defendants sued herein as Does 1 through 10, inclusive, and each

1 of them, were in some manner responsible or legally liable for the events, actions,
 2 transactions, and circumstances alleged herein. The true names and capacities of
 3 the fictitiously named defendants, whether individual, corporate, associate, or
 4 otherwise, are presently unknown to Plaintiffs, and Plaintiffs will seek leave of this
 5 Court to amend this Complaint to assert the true names and capacities of the
 6 fictitiously named defendants when they become known to Plaintiffs. Hereinafter
 7 all defendants, including the Doe Defendants, will sometimes be referred to
 8 collectively as “Defendants.”

9 19. Plaintiffs are informed and believe, and based thereon allege, that
 10 Defendants, and each of them, were the agents, employees, partners, joint-
 11 venturers, owners, principals, and/or employers of the remaining Defendants, and
 12 each of them, and are, and at all times herein mentioned were, acting within the
 13 course and scope of that agency, employment, partnership, joint venture, or
 14 ownership. Plaintiffs are further informed and believe, and based thereon allege,
 15 that the acts and conduct herein alleged of each such Defendant were known to,
 16 authorized by, and/or ratified by the other Defendants, and each of them.

17 **GENERAL ALLEGATIONS**

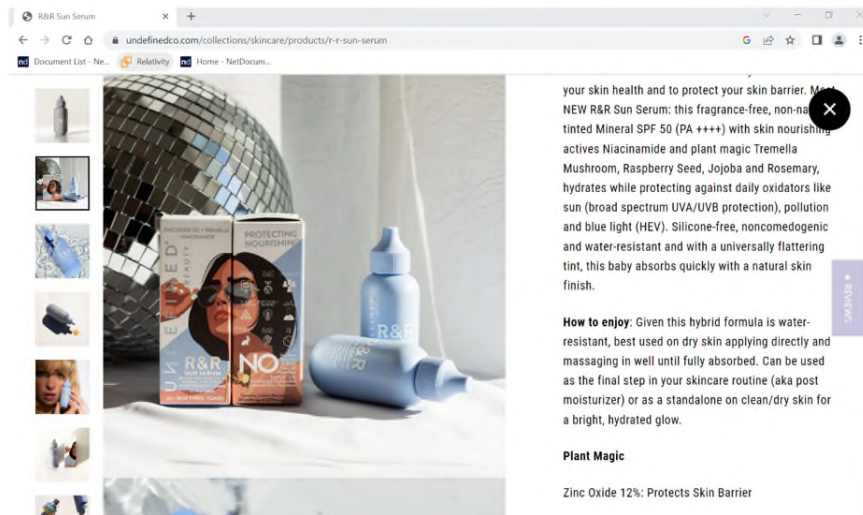
18 20. As detailed above, Ms. Xavier is a globally recognized fashion
 19 influencer, content creator, and successful entrepreneur. She is highly sought after
 20 by companies hoping to secure her endorsement of their products, and those
 21 companies are willing pay significant sums of money to engage Ms. Xavier to help
 22 promote their brands.

23 21. On August 3, 2018, and October 13, 2018, Ms. Xavier posted the
 24 following photograph to her Instagram account (the “Xavier Photo”). Thrifts and
 25 Threads is the owner of all right, title, and interest in the Xavier Photo, including
 26 the copyright rights. The Xavier Photo was taken by Ms. Xavier’s husband on
 27 August 3, 2018, and he subsequently assigned the copyright rights to Thrifts and
 28 Threads.



22. Thrifts and Threads registered the Xavier Photo with the U.S. Copyright Office on March 14, 2023. A copy of the registration certificate and associated deposit materials (the “Registration”) is attached hereto as **Exhibit A**.

23. Undefined is unlawfully using a derivative image of the Xavier Photo and exploiting Ms. Xavier’s image, likeness, and persona without her approval or consent to promote Undefined’s R&R Sun Serum directly via its website and social media, as well as through third party sites, such as Ulta and Target, and in stores such as Whole Foods. *See e.g.*, https://undefinedco.com/products/r-r-sun-serum?_pos=1&_sid=4c5b542c5&_ss=r; <https://www.instagram.com/p/CkJQBIEj5fe/>; https://www.ulta.com/p/r-r-sun-serum-pimprod2035000?sku=2601916&_requestid=814318; <https://www.target.com/p/undefined-r-38-r-sun-serum-spf-50-1-7-fl-oz/-/A-83670784>; and <https://www.wholefoodsmarket.com/product/undefined-beauty-rr-sun-serum-17-fl-oz-b0913f765b>.



24. Thrifts and Threads takes its intellectual property rights seriously and has maintained strict control of the copyright to the Xavier Photo.

25. Plaintiffs have never granted Undefined or Casielle Santos-Gaerlan, the digital artist who appears to have created the unauthorized derivative image, any rights to use the Xavier Photo or Ms. Xavier's name, image, likeness, or persona in any way.

26. Ms. Xavier's name, image, likeness, and persona have substantial economic value when used for the purposes of advertising, marketing, promoting, or endorsing products or services, and/or when she serves as a commercial spokesperson. That valuable property right has been misappropriated through Undefined's unauthorized use of the Xavier Photo and Ms. Xavier's image, likeness, and persona, and has caused a dilution of the value of same.

27. On January 11, 2023, January 24, 2023, and February 7, 2023, counsel for Plaintiffs sent a letter to Undefined demanding that Undefined immediately "cease and desist its infringing and violative conduct." The letter further demanded that Undefined "(1) provide written confirmation that it has ceased any and all use of the Xavier Photo and Ms. Xavier's image, likeness and persona on the Infringing Products themselves and on any promotional or marketing materials, websites,

1 social media, merchandise, catalogues, or other advertisements; (2) confirm in
 2 writing and provide evidence that it has removed, deleted, or otherwise destroyed
 3 any and all marketing, advertising, and promotional materials connected with the
 4 Infringing Products, including the products themselves that depict an unlicensed
 5 derivative of the Xavier Photo or Ms. Xavier's image, likeness, and persona; and
 6 (3) provide an accounting of all existing inventory and all sales and profits to date
 7 of any and all Infringing Products using an unlicensed derivative of the Xavier
 8 Photo or Ms. Xavier's image, likeness, and persona." Undefined ignored and never
 9 responded to the letter.

10 **FIRST CLAIM FOR RELIEF**

11 **(Copyright Infringement under the Copyright Act – 17 U.S.C. § 501(a))**

12 **(Against All Defendants)**

13 28. Plaintiffs incorporate all prior allegations of this Complaint by this
 14 reference.

15 29. Thrifts and Threads is the owner of the Xavier Photo, which is
 16 embodied in the Registration.

17 30. Thrifts and Threads has the exclusive right to reproduce, distribute,
 18 display, perform, prepare derivative works of, and use the Xavier Photo.

19 31. Upon information and belief, Defendants have actual notice of Thrifts
 20 and Threads' rights in and to the Xavier Photo and corresponding Registration.

21 32. Defendants failed to obtain Thrifts and Threads' consent or
 22 authorization to use, reproduce, copy, display, distribute, prepare derivative works
 23 of, sell and/or market the Xavier Photo embodied in the Registration.

24 33. Defendants, without permission, knowingly and intentionally
 25 reproduced, copied, displayed, distributed, prepared derivative works of, and/or
 26 marketed the Xavier Photo, by, at a minimum, using a derivative image of the
 27 Xavier Photo to promote the Infringing Products directly via Undefined's website
 28 and social media, as well as through third party sites, such as Ulta and Target, and

1 in stores such as Whole Foods.

2 34. Defendants' unlawful and willful actions constitute infringement of the
3 Xavier Photo, including Thrifts and Threads' rights, at the very least, to reproduce
4 and prepare derivative works of the Xavier Photo, in violation of 17 U.S.C.
5 § 501(a).

6 35. Defendants' knowing and intentional copyright infringement of the
7 Xavier Photo has caused substantial and irreparable harm to Thrifts and Threads
8 and, unless enjoined, Defendants will continue to cause substantial and irreparable
9 harm to Thrifts and Threads for which Thrifts and Threads has no adequate remedy
10 at law.

11 36. Thrifts and Threads is therefore entitled to injunctive relief under 17
12 U.S.C. § 502, its actual damages in an amount to be proven at trial, and Defendants'
13 profits in an amount to be proven at trial.

14 **SECOND CLAIM FOR RELIEF**

15 **(Violation of Statutory Right of Publicity – Cal. Civ. Code § 3344)**

16 **(Against All Defendants)**

17 37. Plaintiffs incorporate all prior allegations of this Complaint by this
18 reference.

19 38. Ms. Xavier is the owner of the rights of publicity in her name, image,
20 likeness, and persona.

21 39. Defendants have willfully and without authorization used Ms. Xavier's
22 image, likeness, and persona for commercial purposes to promote Undefined, and
23 specifically to promote the Infringing Products directly via their website and social
24 media, as well as through third party sites, such as Ulta and Target, and in stores
25 such as Whole Foods.

26 40. Defendants' unauthorized use of Ms. Xavier's image, likeness, and
27 persona constitute a commercial misappropriation in violation of Section 3344 of
28 the California Civil Code.

41. As a direct and proximate result of Defendants' wrongful conduct, Ms. Xavier has suffered, and will continue to suffer, damages in an amount to be proven at trial, but in no event less than \$1 million.

42. Defendants have further been unjustly enriched by their misappropriation of Ms. Xavier's statutory right of publicity. Accordingly, Ms. Xavier is entitled to restitution of all income, profits, and other benefits resulting from Defendants' unlawful conduct, in an amount to be determined according to proof at trial. Ms. Xavier also is entitled to her attorneys' fees and costs.

43. Defendants' actions as alleged above were malicious, oppressive, and fraudulent, and done with the intent to injure Ms. Xavier and with a willful and conscious disregard for Ms. Xavier's rights. As a result, Ms. Xavier is entitled to recover from Defendants punitive and exemplary damages in an amount sufficient to punish and deter them and others from engaging in such acts in the future.

44. Defendants' violations alleged herein are continuing and unless restrained and enjoined will cause irreparable injury to Ms. Xavier for which she has no adequate remedy at law.

THIRD CLAIM FOR RELIEF

(Violation of the California Common Law Right of Publicity)

(Against All Defendants)

45. Plaintiffs incorporate all prior allegations of this Complaint by this reference.

46. Ms. Xavier is the owner of the common law rights of publicity in her name, image, likeness, and persona.

47. Defendants have willfully and without authorization used Ms. Xavier's image, likeness, and persona for commercial purposes to promote Undefined, and specifically to promote the Infringing Products directly via their website and social media, as well as through third party sites, such as Ulta and Target, and in stores such as Whole Foods.

48. Defendants' unauthorized use of Ms. Xavier's image, likeness, and persona constitutes a violation of California's common law right of publicity.

49. As a direct and proximate result of Defendants' wrongful conduct, Ms. Xavier has suffered, and will continue to suffer, damages in an amount to be proven at trial, but in no event less than \$1 million.

50. Defendants have further been unjustly enriched by their infringement of Ms. Xavier's common law right of publicity. Accordingly, Ms. Xavier is entitled to restitution of all income, profits, and other benefits resulting from Defendants' conduct, in an amount to be determined according to proof at trial.

51. Defendants' actions as alleged above were malicious, oppressive, and fraudulent, and done with the intent to injure Ms. Xavier and with a willful and conscious disregard for Ms. Xavier's rights. As a result, Ms. Xavier is entitled to recover from Defendants punitive and exemplary damages in an amount sufficient to punish and deter Defendants and others from engaging in such acts in the future.

52. Defendants' violations alleged herein are continuing and unless restrained and enjoined will cause irreparable injury to Ms. Xavier for which she has no adequate remedy at law.

FOURTH CLAIM FOR RELIEF

(False Endorsement and Unfair Competition Under the Lanham Act – 15

U.S.C. § 1125(a))

(Against All Defendants)

53. Plaintiffs incorporate all prior allegations of this Complaint by this reference.

54. Ms. Xavier is the owner of the statutory and common law rights associated with her name, image, likeness, and persona necessary for endorsement deals, including her right to decide whether to associate her name, image, likeness, and persona with any third party for purposes relating to sponsorship and/or endorsement.

1 55. Defendants used Ms. Xavier's image, likeness, and persona without
2 permission by posting onto Undefined's website and social media, as well as
3 through third party sites and stores, a derivative image of the Xavier Photo to
4 promote Undefined, and specifically to promote the Infringing Products.

5 56. Defendants' unauthorized uses constitute false or misleading
6 representations of fact to falsely imply the endorsement of Undefined's business
7 and product by Ms. Xavier.

8 57. Defendants' unauthorized uses of Ms. Xavier's image, likeness, and
9 persona are likely to confuse and deceive consumers as to Ms. Xavier's
10 sponsorship, endorsement, and/or approval of Undefined and its products.
11 Specifically, Defendants' use of Ms. Xavier's image, likeness, and persona is likely
12 to cause consumers to mistakenly believe that Ms. Xavier is associated with
13 Undefined, or that she sponsors, endorses, or approves of Defendants' products,
14 websites, or social media accounts.

15 58. Defendants' wrongful acts have misled and confused consumers, and
16 continue to mislead and confuse consumers, by, among other things, willfully and
17 intentionally creating a false impression that Defendants' products are, or were,
18 sponsored, endorsed, approved, affiliated, or associated with Ms. Xavier.

19 59. As a direct and proximate result of the acts of false endorsement and
20 unfair competition set forth above, Ms. Xavier has suffered actual damages in an
21 amount to be proven at trial, but in no event less than \$1 million. Ms. Xavier is
22 entitled to the full range of relief available under the Lanham Act, 15 U.S.C.
23 § 1117, including, without limitation, an award of actual damages and the
24 disgorgement of Defendants' profits arising from their false, misleading, or unfair
25 acts. Defendants' conduct further renders this an "exceptional" case within the
26 meaning of the Lanham Act, thus entitling Ms. Xavier to an award of attorneys'
27 fees and costs.

28 60. Ms. Xavier is informed and believes, and based thereon alleges, that

Defendants committed the unauthorized acts described above knowing that they are likely to cause consumers to falsely believe that Ms. Xavier endorses Defendants' brand and product. Defendants have thus willfully, knowingly, and maliciously deceived and confused the relevant consuming public, such that Ms. Xavier is entitled to an award of treble damages.

61. Defendants' violations alleged herein are continuing and unless restrained and enjoined will cause irreparable injury to Ms. Xavier for which she has no adequate remedy at law.

FIFTH CLAIM FOR RELIEF

(Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, et seq.)

(Against All Defendants)

62. Plaintiffs incorporate all prior allegations of this Complaint by this reference.

63. The acts and practices of Defendants as set forth above constitute unfair, unlawful, wrongful, and fraudulent business practices in violation of California's Unfair Competition Law ("UCL"), Business and Professions Code § 17200, et seq.

64. As a direct and proximate result of Defendants' unfair business practices, as set forth herein, Plaintiffs have lost money or property, and have suffered, and will continue to suffer, injury in fact in an amount to be proven at trial.

65. Plaintiffs seek restitution of all amounts wrongfully obtained by Defendants as a result of the aforementioned conduct.

66. Defendants have engaged, and are continuing to engage, in unfair competition as prohibited by California Business and Professions Code § 17200, et seq., including without limitation engaging in the aforementioned acts and practices which are unfair, unlawful, fraudulent, substantially injurious to the general public, and offensive to public policy.

67. Defendants' violations alleged herein are continuing and unless restrained and enjoined will cause irreparable injury to Plaintiffs for which they have no adequate remedy at law.

SIXTH CLAIM FOR RELIEF

(False Advertising in Violation of Cal. Bus. & Prof. Code § 17500, et seq.)

(Against All Defendants)

68. Plaintiffs incorporate all prior allegations of this Complaint by this reference.

69. The acts and practices of Defendants as set forth above constitute false advertising in violation of California Business and Professions Code § 17500, et seq.

70. Defendants' advertising was and is untrue or misleading and likely to deceive the public because, among other things, it falsely implies the endorsement of Undefined's business and products by Ms. Xavier.

71. Defendants knew, or by reason of reasonable care should have known, that their advertising was and is untrue or misleading and so acted in violation of California Business and Professions Code § 17500, et seq.

72. As a direct and proximate result of Defendants' false advertising, as set forth herein, Ms. Xavier has lost money or property, and has suffered, and will continue to suffer, injury in fact in an amount to be proven at trial.

73. Ms. Xavier seeks restitution of all amounts wrongfully obtained by Defendants as a result of the aforementioned conduct.

74. Defendants' violations alleged herein are continuing and unless restrained and enjoined will cause irreparable injury to Ms. Xavier for which she has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Brittany Xavier and Thrifts and Threads pray for judgment as follows:

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and Civil L.R.
3-6, Plaintiffs hereby demand a trial by jury on all issues so triable.

Dated: March 29, 2023

NIXON PEABODY LLP

By: /s/ Erica J. Van Loon

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